

## ESSAY

### TWO MODELS OF TORT (AND TAKINGS)

*Scott Hershovitz\**

#### INTRODUCTION

SINCE the publication of *The Cost of Accidents*,<sup>1</sup> the model of costs has been the dominant approach to tort theory. On the model of costs, tort law promotes efficiency by requiring agents to internalize the costs they impose on others when it is efficient to do so. Despite its success, the model of costs is deeply puzzling. Positive externalities are as inefficient as negative externalities. Therefore, if the model of costs provides a good explanation of tort law, one would expect that we would also have a legal regime oriented towards the recapture of the benefits we confer on others. In some instances, restitution allows the recapture of positive externalities, but compared to tort, it is a trifling part of the law.<sup>2</sup>

Let me make the puzzle more vivid. Suppose that my well's water is not potable, and I set out to purify it.<sup>3</sup> If in doing so I accidentally introduce a pollutant into your water, I will be liable for the damage in tort. Holding me responsible for costs I impose on you is sensible. Otherwise, I will have no incentive to consider those costs when deciding whether to purify my water. But the reverse does

---

\* Assistant Professor Designate, University of Michigan Law School. I would like to thank Aditya Bamzai, Omri Ben-Shahar, Evan Caminker, William Fletcher, John Gardner, Mark Greenberg, Jill Horwitz, Jim Krier, Daniel Markovits, Stephen Perry, Larry Solum, and Lewis Yelin for helpful comments and conversations about this Essay and its antecedents. And I would like to thank Jules Coleman for the same and much more.

<sup>1</sup> Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970).

<sup>2</sup> See Saul Levmore, *Explaining Restitution*, 71 Va. L. Rev. 65, 71 (1985) (“[T]he legal remedies available to victims of harms are far superior to those enjoyed by the analogous providers of nonbargained benefits.”).

<sup>3</sup> This example is adapted from Levmore, *supra* note 2, at 71–72.

not hold. If, as a byproduct of rendering my own water potable, I purify yours as well, I cannot demand that you contribute to the cost. Because I cannot, I lack the proper incentive to undertake the effort. Some of the gains of my activity will fall on you, and since I cannot recapture them, I may forego the effort even though the total gains would exceed the cost. If the point of tort law is to promote efficient behavior, it is puzzling that we require people to reclaim their negative externalities but do not allow them to recapture the positive ones.

The puzzle is pervasive. Suppose that I own a factory from which noxious odors escape. I will be liable to my neighbors in nuisance. This too is sensible, as it gives me an incentive to consider the costs I might impose on my neighbors when deciding how to use my property. But if I own a symphony hall instead of a factory, I cannot demand compensation from my neighbors, even if they delight in the beautiful music that emanates from the building. Once again, I lack the proper incentive to build a symphony hall, as some of the gains from the activity will fall on others and the law does not allow me to recapture them.<sup>4</sup>

The asymmetry between the legal consequences of harms and benefits is a fundamental, structural feature of our law. Any successful explanation of our legal institutions must account for it. Thus it is curious, to say the least, that the dominant theoretical approach to tort law is one in which the harm-benefit asymmetry is puzzling. One of the goals of this Essay is to explore the ability of the model of costs to explain the harm-benefit asymmetry. As we shall see, the puzzle has not been lost on economists, and one in particular—Professor Saul Levmore—has been especially resourceful in his attempts to explain it. Nevertheless, we shall find that economic explanations of the harm-benefit asymmetry devolve quite quickly into a complex and confusing mishmash of ad hoc explanations of particular cases.

In contrast, the harm-benefit asymmetry is not at all puzzling if one abandons the model of costs and returns to the view of tort common in the days before Calabresi recast the institution. On the older view, which still finds expression in the work of Professors

---

<sup>4</sup> See the discussion of beneficence in Robert C. Ellickson & Vicki L. Been, *Land Use Controls* 539–44 (3d ed. 2005).

2006]

*Two Models of Tort (and Takings)*

1149

Jules Coleman and Stephen Perry, among others, tort redresses private wrongs. That is, tort redresses the harms that we inflict on one another. I shall call this view the model of harms, since harm plays the organizing role in this approach to tort that cost plays in the economic approach. As we shall see, on the model of harms, the harm-benefit asymmetry is a natural expression of the moral difference between harming and benefiting, a difference that the model of costs obscures.

The main part of this Essay will explore tort law, but the harm-benefit asymmetry poses a puzzle for the model of costs in other areas of legal doctrine as well. We shall consider one such area—takings jurisprudence—because recent scholarship has brought the puzzle into clear relief. In an article entitled *Givings*, Professors Abraham Bell and Gideon Parchomovsky argue that we ought to have a jurisprudence of givings to complement our constitutional takings jurisprudence.<sup>5</sup> In their view, “[t]akings and givings are two sides of the same coin.”<sup>6</sup> The Constitution requires the government to pay just compensation when it takes away property. Bell and Parchomovsky argue that the government should also be required to impose a fair charge when it gives away property.

It is not hard to see why the model of costs would lead Bell and Parchomovsky to this conclusion. Without the Takings Clause, the government would not be required to internalize the costs it imposes on people when it takes property by eminent domain. In the absence of a Givings Clause, government cannot recapture (or, more accurately, is not required to recapture) the benefits it confers on people by giving property. Since both positive and negative externalities contribute to inefficient government behavior,<sup>7</sup> the absence of a givings jurisprudence is puzzling from the perspective of the model of costs. But something has gone amiss. If the fact that we have a Takings Clause but no Givings Clause were truly a puzzle, in the two hundred plus years since the adoption of the Takings Clause someone would have suggested a Givings Clause

---

<sup>5</sup> Abraham Bell & Gideon Parchomovsky, *Givings*, 111 *Yale L.J.* 547, 552–57 (2001).

<sup>6</sup> *Id.* at 563.

<sup>7</sup> *Id.* at 580–81.

before Bell and Parchomovsky.<sup>8</sup> As I shall explain, the puzzle is itself a creature of the model of costs.

I shall set out the argument about takings in greater detail in Part III of this Essay. Part I will examine attempts to account for the harm-benefit asymmetry using the model of costs. Part II will explore what harm is and suggest that the source of law's harm-benefit asymmetry is an underlying asymmetry in the nature of harms and benefits.

#### I. THE HARM-BENEFIT ASYMMETRY ON THE MODEL OF COSTS

Economic explanations of the harm-benefit asymmetry, like economic explanations of tort more generally, focus on costs and incentive effects. The most sophisticated economic explanations of the harm-benefit asymmetry offered to date are found in the work of Saul Levmore, who has written about the asymmetry as part of his effort to explain restitution doctrine. Levmore's approach to restitution doctrine is familiar from tort scholarship. One common approach to tort takes the view that liability rules operate to create hypothetical bargains where, in the absence of transaction costs, the parties themselves would have reached an agreement. A theorist who takes this view might argue that if every driver were able to negotiate an agreement with every other driver regarding the care they would take towards one another, it is plausible that they would arrive at a rule similar to the Hand formula. That is, they might agree that each driver should take whatever driving precautions are cost-justified. Because the transaction costs associated with each driver negotiating an agreement with every other driver are prohibitively high, the theorist might argue, the law substitutes a hypothetical bargain in the form of the negligence standard. I am

---

<sup>8</sup> Bell and Parchomovsky cite some intellectual ancestors for their work on givings. None predate 1978, and all are, broadly speaking, works of law and economics. See *id.* at 549 n.3 (citing Richard A. Epstein, *Bargaining with the State* 3–12 (1993); Windfalls for Wipeouts (Donald G. Hagman & Dean J. Misczynski eds., 1978); Eric Kades, *Windfalls*, 108 *Yale L.J.* 1489, 1491 (1999); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 *Harv. L. Rev.* 509 (1986); J. Gregory Sidak & Daniel F. Spulber, *Givings, Takings, and the Fallacy of Forward-Looking Costs*, 72 *N.Y.U. L. Rev.* 1068 (1997); C. Ford Runge et al., *Government Actions Affecting Land and Property Values: An Empirical Review of Takings and Givings* (Lincoln Inst. of Land Policy, Working Paper No. WP96CR1, 1996)).

2006]

*Two Models of Tort (and Takings)*

1151

not partial to this way of thinking about tort,<sup>9</sup> but there is no doubt that it is an influential and powerful approach to understanding the doctrine.

Levmore adopts this framework in his approach to restitution. He supposes that the law will deny restitution when it would be more efficient for the parties to reach a bargain themselves. Conversely, the law will make restitution available when imposing a hypothetical bargain is more efficient than requiring an actual one. The challenge, as Levmore conceives it, is to explain why the law of restitution is less generous in creating hypothetical bargains than tort is.

The first explanation Levmore explores is the difficulty that courts have with *valuation*. Requiring restitution for nonbargained benefits may be socially desirable where high transaction costs prevent parties from reaching bargains, but this will be true only if courts are able to value benefits accurately.<sup>10</sup> If courts routinely overvalue benefits, “overencouraged providers may intermeddle.”<sup>11</sup> Undervaluation would also be inefficient.

If valuation difficulties were a good explanation for the reluctance of the law to provide remedies for the providers of nonbargained benefits, one would expect that restitution would be available when valuation is easy. Levmore uses an example to illustrate the point. A noncontractual improver of real property is generally not entitled to restitution. However, a cotenant who has improved property can seek restitution from other tenants in a partition action. The difference, Levmore suggests, is that in the partition case, the court must ascertain the value of the property anyway. Once

---

<sup>9</sup> I have never been clear on what normative significance the claim that the parties *would* have reached a bargain of a particular sort under different conditions is supposed to have. The argument usually runs like this: (a) each party would have been better off if they had an agreement to do *X*; (b) because it would make them better off, the parties would have agreed to do *X* were there no transaction costs; so (c) we are justified in imposing *X* on the parties. The challenge for the hypothetical bargain theorist is to explain what premise (b) adds to the justification for conclusion (c). That is, why do (a) and (b) taken together provide better support for (c) than (a) alone? The answer cannot be that premise (b) respects the liberty or autonomy of the parties, for it does not. This is the same problem faced by hypothetical consent approaches to the legitimacy of political authorities.

<sup>10</sup> Levmore, *supra* note 2, at 70.

<sup>11</sup> *Id.*

this process is under way, valuation of the improvement “probably require[s] little additional work for the partitioning court.”<sup>12</sup>

Counter-examples exist—cases in which valuation is not a problem, yet restitution is denied.<sup>13</sup> But the real problem with appealing to valuation difficulties to explain the harm-benefit asymmetry is that tort injuries are no less difficult to value as a class than non-bargained benefits.<sup>14</sup> Valuation difficulties do not appear to constrain courts from offering remedies in tort. Therefore, there is no reason to think that they can explain the comparative unwillingness of courts to offer remedies for the gratuitous conferral of benefits.

Levmore’s second attempt to explain the harm-benefit asymmetry appeals to another idea familiar from tort theory: the “better bargainer thesis.”<sup>15</sup> The thesis is that the law aims to place liability on the least-cost avoider. The least-cost avoider is frequently the party best able to control a situation. Levmore suggests that the provider of benefits usually has more control over their provision than a recipient does. By making nonrecovery the default rule, the law gives providers an incentive to negotiate an agreement in advance of conferring benefits.

The better bargainer thesis has two problems as an explanation of the harm-benefit asymmetry. First, as Levmore notes, it does not do a good job of explaining cases in which restitution is granted to nonbargaining providers.<sup>16</sup> Levmore points to the availability of restitution to debtors who mistakenly overpay creditors. The debtor who overpays is normally in a better position than the recipient to avoid the costs associated with overpayment. It is not clear why the law would make restitution available if it were seeking to place liability on the better bargainer.

The deeper problem with the better bargainer thesis is also familiar from tort theory. Frequently, the least-cost avoider will be someone other than the provider, just as someone other than the

---

<sup>12</sup> *Id.*

<sup>13</sup> For example, an intermeddling mechanic who changes the oil in every car he encounters cannot recover the market price for an oil change, even though it is not difficult to value the benefit he confers on the unwitting owners. See *infra* note 22 and accompanying text.

<sup>14</sup> Levmore, *supra* note 2, at 71 (“The typical tortious injury is at least as difficult to value as the average noncontractual benefit.”).

<sup>15</sup> *Id.* at 73.

<sup>16</sup> *Id.*

injurer is frequently the least-cost avoider in tort. As Levmore puts it, “it is rarely possible to determine in advance which recipients of nonbargained benefits are better bargainers than their providers.”<sup>17</sup> To this, we might add the worry that, as in tort, on occasion the least-cost avoider may be neither the provider nor the recipient of the benefit, but some third party. While the better bargainer thesis may often appear illuminating ex post, Levmore observes, “it is not possible to predict through this explanation when the law will grant restitution to nonbargaining providers.”<sup>18</sup> Because the world does not divide so neatly as to make noncontractual providers of benefits the least-cost avoiders in any given situation, the better bargainer thesis is of limited utility in explaining the harm-benefit asymmetry.

Levmore begins to make real progress with his third attempt to explain the harm-benefit asymmetry. He points out that the consumption choices we make are, in part, a function of our wealth and tastes. Levmore refers to this concept as “wealth dependency,” which he explains as follows: “[t]he concept of wealth dependency offers a neat and rigorous way to say simply that a recipient may genuinely not want a benefit that is forced upon him, even though its market value may be greater than the amount of restitution sought by the provider.”<sup>19</sup> Levmore’s example is the one that led off this Essay. Suppose that as a byproduct of purifying my well water, I purify yours too. You might plausibly maintain that, given your current wealth, the benefit of the purified water is almost worthless to you. Left to make consumption choices on your own, you would not choose to contract for services to purify your water. If I can demand that you pay me the market price for water purification, or even something substantially less, I have the power to force on you consumption that you would not otherwise have chosen.

Levmore suggests that wealth dependency can provide a “general explanation” of the harm-benefit asymmetry.<sup>20</sup> To illustrate, he contrasts a homeowner whose well has been polluted with one whose well has been cleaned. He points out that “[t]he homeowner

---

<sup>17</sup> Id. at 74.

<sup>18</sup> Id.

<sup>19</sup> Id. at 77.

<sup>20</sup> Id.

is unambiguously worse off when his usable water is polluted but not unambiguously better off after a forced purchase of additional pure water.<sup>21</sup> Levmore may be right about this, but, as illuminating as the wealth dependency explanation is in some cases, it does not fare well as a general explanation of the harm-benefit asymmetry. Levmore himself notes that it fails to explain cases where a “recipient has previously contracted to receive a good or service” and an intermeddler provides them instead.<sup>22</sup> For example, someone waiting in line at Jiffy Lube to have her oil changed cannot appeal to wealth dependency as a reason why restitution should be denied to an intermeddling mechanic, because she has not been denied the opportunity to choose how to consume her wealth.

We will consider further difficulties with wealth dependency in a moment, but first we should examine Levmore’s fourth and final explanation, which is targeted at cases like the Jiffy Lube case. Levmore argues that denying restitution to intermeddling providers of benefits in these cases is necessary to encourage the development of “thick markets,” markets that are composed of many active buyers and sellers. Levmore illustrates the point as follows:

[I]magine a world in which restitution claims are always granted. For example, where P repairs R’s car soon after R has contracted to bring his car to Q’s repair shop, P will be entitled to restitution. Assume that nonbargaining provider P bears the burden of proof on work quality and the existence of the contract with Q (which overcomes any wealth-dependency claim by R) and that P asks only Q’s price. If “copycats” like P learn to expect reimbursement at Q’s price, they will soon decline to seek out R and bid for his business. Instead, they will hold back and freeride on Q’s bidding efforts . . . . One can easily imagine that this restitution-granting world would be characterized by thin markets. A few potential providers, like Q, will seek out potential recipients and make contractual arrangements, but many potential providers, like P, will hold back.<sup>23</sup>

Levmore calls this the market encouragement explanation, and it is ingenious. I think it succeeds on its own terms, but it does not

---

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 78.

<sup>23</sup> *Id.* at 79.



2006]

*Two Models of Tort (and Takings)*

1155

overcome fully the deficiencies of wealth dependency as an explanation of the harm-benefit asymmetry.

Levmore notes that wealth dependency does not explain cases in which restitution is denied despite the fact that the benefits conferred can be easily monetized.<sup>24</sup> If a benefit is received in cash or can easily be turned into cash, one can hardly object that being forced to disgorge all or part of it leaves one worse off than one was prior to receiving the benefit. Levmore's water-purification example is compelling because one can easily imagine that there is no ready market for the newly potable water which would allow the recipient to monetize the benefit.

Additionally, wealth dependency has difficulty explaining the denial of restitution when the recipient is a profit-seeking enterprise. This class of cases includes gratuitous referrals. Levmore sets up the problem as follows:

Imagine that provider *P*, without any urging by recipient *R*, unexpectedly meets travelers at an airport and with some effort convinces them to accept his transportation and recommendation that they register at Hotel *R*. *R* is experiencing slack demand and can service additional customers with little extra cost. . . . [I]magin[e] that *P* asks only for a customary commission or his expenses.<sup>25</sup>

*P* will lose a suit in restitution if *R* refuses to pay. This result is not explained by wealth dependency or any of the other explanations we have examined. Levmore explains the result by suggesting that it is a response to an "enforcement asymmetry."<sup>26</sup> He supposes that *P* may encourage people to patronize *R1* by slandering *R2*. If this happens, *R2* will be able to recover in tort for the slander. Levmore says that if *P* is able to seek restitution from *R1*, she will always do so, but that *R2* will not always learn that *P* has defamed him. Thus, Levmore says that "opportunistic intermeddlers will try to reallocate customers from *R2* to *R1*, knowing that restitution from *R1* will greatly exceed defamation payments to *R2*."<sup>27</sup> Because of this

---

<sup>24</sup> Id. at 77.

<sup>25</sup> Id. at 109–10.

<sup>26</sup> Id. at 111.

<sup>27</sup> Id. at 110–11 (italicization added for consistency).

enforcement asymmetry, Levmore thinks the law is forced to respond to harms and benefits asymmetrically in this situation.

I am not sure that Levmore is correct. He notes that punitive damages in the defamation action could solve the enforcement problem, but he rejects them because they might chill speech.<sup>28</sup> That may be true, but it may not be, as it may be possible to structure the requirements for punitive damages so as to minimize the danger. Moreover, there will be many cases in which *P* convinces people to patronize *R1* by extolling *R1*'s virtues, not by slandering *R2*. *P* could be made to bear the burden of proving that he did not slander anyone (difficult, perhaps, but not impossible) in order to recover.

In any case, even if Levmore's explanation works on its own terms, it suggests the limited resources available to economists to explain the harm-benefit asymmetry. One can hardly imagine a more narrowly drawn, ad hoc explanation of why the law treats harms and benefits differently. We have arrived at the point where economics must add epicycles.

A simpler explanation is available. The law provides a remedy for defamation because slander wrongs the victim by infringing her right to her good reputation. The law does not provide a remedy for a gratuitous favorable recommendation because there is no wrong to remedy.<sup>29</sup> But we are getting ahead of ourselves. For now, I will simply note that when it comes to defamation, the cost imposed on the victim does not appear to be the law's primary concern. A negative recommendation imposes a cost on the victim irrespective of its truth, but truth is always a defense in a defamation action.<sup>30</sup>

---

<sup>28</sup> *Id.* at 110 n.100.

<sup>29</sup> Of course, a favorable recommendation that is false may wrong both the recipient of a recommendation and the subject of the recommendation.

<sup>30</sup> To account for the fact that truth is a defense to a defamation action on the model of costs, one would have to show that the gains from allowing people to make negative statements about others outweigh the losses, so long as those statements are true. It is not hard to imagine circumstances in which the losses (e.g., the emotional and reputational costs) outweigh the gains. If there are such circumstances, then to explain why truth is always a defense to defamation, one must show that it is more efficient to administer a system in which truth is always a defense than it is to administer a system in which truth is only a defense when the gains of expressing truths about others outweigh the losses. All this might be possible, but it is difficult to see how one would even begin to go about it.

Even if one is satisfied with Levmore's explanation of the referral case, the problems mount. The referral cases are but a small portion of the cases in which nonbargained benefits are conferred on profit-seeking enterprises, and the economic explanations we have examined so far leave these cases unexplained. Consider a recent lawsuit filed by the Chicago Cubs against the operators of rooftop bleachers neighboring Wrigley Field. The operators earn millions of dollars each year by allowing patrons to watch Cubs games from the bleachers. The Cubs's complaint called the operators "free-riders who profiteer on Plaintiff's enormous annual expenditures on—and historical investment in—the Chicago Cubs baseball team and Wrigley Field."<sup>31</sup> The Cubs sought recovery for unjust enrichment and an injunction barring operation of the rooftop bleachers. The team also complained of copyright and trademark infringement. Though the litigation ultimately settled,<sup>32</sup> the Cubs's claim to restitution of the profits of the rooftop operators was almost certainly a loser.

The National League's long-defunct Detroit Wolverines lost a similar suit in 1886.<sup>33</sup> The Wolverines's home was Recreation Field. An adjacent property owner named Deppert erected bleachers on top of his barn, which overlooked the stadium, and he sold tickets that allowed patrons to watch Wolverines games. The Wolverines argued that Deppert was profiting at the expense of the club. They sought injunctive relief, which the court denied. In declining to give

---

The complexity of the problem makes one suspect that there is a simpler explanation of the fact that truth is a defense to a defamation action. One such explanation might be that, in general, people have no right to be free from others disseminating true information about them. There are of course exceptions to this rule: tort actions for the public disclosure of private facts recognize limited rights against the dissemination of truths. And confidentiality agreements can create limited rights against having true information disseminated, though only by people party to the agreement. One way to adjudicate between the model of costs and the model of harms in this narrow context is to ask whether such exceptions exhaust the circumstances in which the losses from the dissemination of true information outweigh the gains.

<sup>31</sup> Complaint for Injunction, Damages and Other Relief at 2, *Chi. Nat'l League Ball Club v. Sky Box on Waveland, L.L.C.*, No. 02C-9105 (N.D. Ill. Dec. 16, 2002).

<sup>32</sup> Plaintiff's Motion to Dismiss Certain Defendants With Prejudice, *Chi. Nat'l League Ball Club v. Sky Box on Waveland, L.L.C.*, No. 02C-9105 (N.D. Ill. Jan. 30, 2004); Stipulation of Dismissal as to Defendant Skybox on Waveland, L.L.C., *Chi. Nat'l League Ball Club v. Skybox on Waveland, L.L.C.*, No. 02C-9105 (N.D. Ill. April 14, 2004).

<sup>33</sup> *Detroit Base-Ball Club v. Deppert*, 27 N.W. 856, 858 (Mich. 1886).

the club an equitable remedy, the court left open the possibility of a legal one. However, it indicated skepticism, observing that “[i]t is difficult to see how the complainant has been pecuniarily injured.”<sup>34</sup> It would be otherwise, the court suggested, if the legislature had extended the club an exclusive franchise for the exhibition of baseball games. In that case, Deppert’s profits would infringe a right belonging to the club. However, the court said that “[i]t does not appear that the complainant . . . had any right to control the use, in any manner, of the adjoining property.”<sup>35</sup> Given this, the court did not see any injury to the Wolverines, even though it clearly understood the Wolverines’s contention that their profits had been reduced by Deppert’s actions.<sup>36</sup> There is no reason to believe the Cubs would have fared any better in persuading the court that the rooftop bleachers injured the club, at least insofar as the Cubs argued that the bleachers’ existence drove Wrigley Field ticket prices down. Of course, the copyright and trademark infringement claims were a different matter altogether.

The baseball cases are not unique. Businesses frequently create profit opportunities for other business, especially ones located nearby. If I open a successful restaurant, it may create opportunities for other entrepreneurs to sell coffee and dessert nearby. I cannot seek restitution for the benefits conferred, however, despite the fact that the benefits are conferred on profit-seeking enterprises and are easily monetized.

One might think that these cases can be explained by the fact that providers of benefits can internalize the profit opportunities they create through contractual means. Thus, the denial of restitution might be an attempt to place liability on the party best able to control the situation, as the better bargainer thesis would predict. When developing a baseball stadium, for example, a team might seek to acquire adjacent property so that it can capture the additional value the presence of the stadium will confer on nearby ar-

---

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Though the court understood the argument that the club’s profits had been reduced, it noted that the club had not proved its claim. The court pointed out that the complaint did not “show that any persons visiting the refreshment stand of the plaintiff would have otherwise paid the admittance fee and entered the complainant’s park.” *Id.*

eas. The problem with this view is the same problem that plagues the better bargainer thesis. In many cases, the transaction costs associated with negotiating prior to the conferral of benefits are prohibitively high.<sup>37</sup> In these cases, the provider may not be the better bargainer, yet the law consistently denies restitution in such cases without regard to the size of transaction costs.

The economic arguments we have examined are illuminating. In a variety of respects, however, they fail as explanations of the harm-benefit asymmetry. First, while they account for the law's unwillingness to allow recapture of positive externalities in a number of cases, they leave many such denials unexplained. Of course, further explanations may be in the offing. One should never underestimate the ability of economists to generate explanations. But that brings us to the second problem. The harm-benefit asymmetry is a basic feature of our law. It would be odd if explaining it required appealing to an endless series of narrowly drawn explanations like the enforcement asymmetry Levmore suggests explains the referral case. One would think the harm-benefit asymmetry would be susceptible to a more elegant explanation.

Finally, we should note one additional challenge that the model of costs faces in explaining both law's harm-benefit asymmetry and tort and restitution doctrine more generally. The language of the

---

<sup>37</sup> In many cases, benefits are conferred long before a proposed development is completed, sometimes even before it is commenced. Rumors of development may be enough to trigger an increase in nearby property values, vastly complicating the acquisition of neighboring projects that are likely to create spillover benefits.

Richard Epstein illustrates further difficulties faced by developers with the following example:

When Disney built Disneyland in Anaheim, it acquired just enough land for a theme park. The major winners of this investment were the neighbors across the street whose property multiplied in value by virtue of the improvements and advertisements by Disney, whose activities brought people from all over the country. The neighbors bore none of the costs, but reaped substantial benefits from this development. When Disney built Disney World in Orlando, on the other hand, it purchased a huge plot of land with hundreds of extra acres in order to limit the positive spillovers to strangers. It worked, sort of. Disney kept more of the gain, but the positive spillovers extended into a wider region and encouraged individuals to rent condominiums five miles from Disney World rather than across the street and drive to Disney World. Disney encountered the same problem in Orlando as in Anaheim, but in a somewhat less dramatic form.

Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong with Euclid*, 5 N.Y.U. Envtl. L.J. 277, 289 (1996).

law is not the language associated with the model of costs. A tort plaintiff cannot simply argue that the costs of accidents will be minimized by imposing liability. To be successful, a plaintiff must make her case in the familiar terms of duty, breach, causation, and damage. A plaintiff seeking restitution for benefits conferred is in a similar boat. Arguing for restitution solely on the ground that it would be efficient will not do; a plaintiff must explain why a right to restitution does or should exist.<sup>38</sup> The fact that the language of the law is not the language of the model of costs does not rule out the model of costs as the best approach to understanding the doctrine. Yet, it should make us skeptical that the model of costs succeeds as an explanation of tort, especially when we discover the complex machinations needed for the model of costs to account for a feature of the law as fundamental as the harm-benefit asymmetry.

## II. THE HARM-BENEFIT ASYMMETRY ON THE MODEL OF HARMS

The model of costs runs into trouble because benefits that fall on others are problematic for exactly the same reason as costs that fall on others. Both are externalities, and in the absence of a mechanism for internalization, they lead to inefficient behavior. Thus, if we think the purpose of tort law is to require agents to internalize their negative externalities, we are left to wonder why we do not have an institution that allows the recapture of positive externalities.

The model of harms avoids this trouble because there is an underlying moral asymmetry between harms and benefits. Thus, from the perspective of the model of harms, it is perfectly intelligible that the institution which redresses the harms that we inflict on one another is more robust than the institution which allows recapture of the benefits that we confer on one another. In this Part, I aim to explicate the moral significance of harm and show how a proper understanding of it illuminates the harm-benefit asymmetry.

---

<sup>38</sup> The argument for creating a right to restitution might appeal to the efficiency of such a right, just as one might argue for a duty in tort law on the ground that it is efficient to assign people that duty. Economic analysis can play a role in common law reasoning, but common law reasoning cannot be reduced to economic analysis. Rights and duties are central to the operation of the law. This point is taken up *infra* in Section II.B.

2006]

*Two Models of Tort (and Takings)*

1161

As Professor Joel Feinberg has pointed out, there is a broad sense of “harm” in which the word “refers to any state of adversely affected interest.”<sup>39</sup> In the broad sense, people can be harmed by avalanches or bacteria, as well as by the deliberate or negligent acts of others. But there is a narrower sense of “harm,” in which the term demarcates a category of special moral concern. This is the sense of “harm” that John Stuart Mill’s harm principle was concerned with, and it is the type of harm that tort law addresses. For the remainder of this Essay, I will use “harm” in the narrow, morally significant sense.

*A. What is Harm?*

Most philosophers agree, in general terms, about what harms are: harms are setbacks to interests.<sup>40</sup> However, this simple formulation obscures a great deal of complexity. Philosophers disagree about what counts as a setback to an interest, and they disagree about whether all setbacks to interests count as harms, or whether only certain setbacks do. The latter issue is central to the argument of this Essay, while the former is somewhat marginal. Nevertheless, we shall briefly examine what counts as a setback to an interest, because without an answer to that question we do not have a full picture of what a harm is.

Unsurprisingly, the best place for us to begin is with Feinberg’s account of harm. According to Feinberg, *A* harms *B* in the relevant sense if and only if:

1. *A* acts (in a sense wide enough to include omissions and extended sequences of activity).
2. *A*’s action is defective or faulty with respect to the risks it creates to *B*, that is, it is done either with the intention of producing

---

<sup>39</sup> Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, in *Freedom and Fulfillment* 3, 4 (1992).

<sup>40</sup> This is not common ground among all theorists. Professor Seana Shiffrin proposes an account of harm that does not invoke the notion of a setback. She suggests that harms are “absolute, noncomparative conditions (e.g., a list of evils like broken limbs, disabilities, episodes of pain, significant losses, death),” rather than changes in position. See Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *Legal Theory* 117, 123–24 (1999).

the consequences for *B* that follow, or similarly adverse ones, or with negligence or recklessness in respect to those consequences.

3. *A*'s acting in that manner is indefensible, that is, neither excusable nor justifiable.

4. *A*'s action is the cause of an adverse effect on *B*'s self-interest (a "state of harm").

5. *A*'s action is also a violation of *B*'s right.<sup>41</sup>

Feinberg's account of harm has been highly influential, but it is also controversial. For our purposes, we can steer clear of some of the controversy by paring Feinberg's account down to two conditions.<sup>42</sup> I shall retain Feinberg's original numbering of his conditions both to underscore the omissions and because I plan to restore one of the conditions once I have defended it. Here is our stripped-down version of Feinberg's account:

*A* harms *B* in the relevant sense if and only if:

1. *A* acts (in a sense wide enough to include omissions and extended sequences of activity).

4. *A*'s action is the cause of an adverse effect on *B*'s self interest (a "state of harm").

---

<sup>41</sup> Feinberg, *supra* note 39, at 6.

<sup>42</sup> Stephen Perry correctly suggests deleting condition 2 from Feinberg's analysis, in part because it is inconsistent with a strict liability theory of recovery in tort. Though Perry recognizes that strict liability may not be morally defensible in the end, he argues that our theory of harm ought not to exclude the possibility that it is, at the outset, defensible. See Stephen Perry, *Harm, History, and Counterfactuals*, 40 *San Diego L. Rev.* 1283, 1285 (2003).

Feinberg himself thought that, given conditions 3 and 4, condition 5 might be redundant. See Feinberg, *supra* note 39, at 6 n.4. Whether it is redundant depends on one's theory of rights, but since redundancy is only a rhetorical defect, we do not need to worry about it.

Perry takes conditions 1 and 4 to constitute the essential elements of Feinberg's account of harm. Perry, *supra*, at 1285–86. As I explain in the text, I think this strips too much from Feinberg's account.



2006]

*Two Models of Tort (and Takings)*

1163

A further premise is required regardless of whether one uses Feinberg's full account or our stripped-down version. Feinberg considers two alternatives:

6. *B*'s personal interest is in a worse condition (usually but not always lower on the interest graph) than it would be in had *A* not acted as he did.<sup>43</sup>

6X. *B*'s personal interest is in a worse condition (lower on the interest graph) than it was in before *A* acted.<sup>44</sup>

If you include condition 6, you have a counterfactual model of harm. If you include condition 6X, you have a historical-worsening model.<sup>45</sup> Feinberg preferred the counterfactual model. Professor Perry, among others, is a partisan for the historical-worsening model.<sup>46</sup>

There is a vibrant debate over whether the counterfactual model or historical-worsening model provides a better account of harm. Neither model accounts for our intuitions across all cases. My view is that both models play an integral role in our concept of harm. Sometimes we regard ourselves as having been harmed because someone has made us worse off than we were before. And sometimes we regard ourselves as having been harmed because we are worse off than we would have been had someone acted differently. Thus, I would be inclined to complete Feinberg's model with a third option:

6\*. *B*'s personal interest is in a worse condition than it would be in had *A* not acted as he did, *or* *B*'s personal interest is in a worse condition than it was before *A* acted.

For the remainder of this Essay, I shall assume one is harmed if condition 6\* is satisfied. That is, one is harmed if either the coun-

---

<sup>43</sup> Feinberg, *supra* note 39, at 7.

<sup>44</sup> *Id.*

<sup>45</sup> "Historical worsening" is Perry's phrase. Perry, *supra* note 42, at 1286.

<sup>46</sup> *Id.* at 1291.

terfactual or historical-worsening model is satisfied. I shall leave the task of defending 6\* for another occasion, however, as the choice between conditions 6, 6X, and 6\* is tangential to the argument of this Essay.

At this point, we should pause to consider a potential problem. We are aiming to explicate the narrow sense of harm, the sense in which harm demarcates a special category of moral concern. Professor Seana Shiffrin has argued that comparative models of harm are not up to the task.<sup>47</sup> Both the counterfactual model and the historical-worsening model are comparative models of harm on Shiffrin's terminology. Thus, if Shiffrin is right, the account of harm we are developing is incapable of explaining why harm is of special moral concern.

According to Shiffrin, a comparative model of harm has two features. The first is that it compares two states to determine whether a harm has occurred.<sup>48</sup> In the counterfactual model, the relevant states are the position of the putative victim after the act that may have harmed her and the position that she would have been in had the act not occurred. In the historical-worsening model, the states are the position of the putative victim before and after the act.

The second feature of a comparative model of harm, on Shiffrin's analysis, is that it treats harms and benefits as commensurable and allows them to be netted against one another.<sup>49</sup> Feinberg's account of harm has this structure. He thought that our interests could be aggregated to give us an all-things-considered measurement of our interest at any given time.<sup>50</sup> As it turns out, this is a dispensable part of Feinberg's account, and it ought to be jettisoned.<sup>51</sup> Thus, we shall focus on Shiffrin's critique insofar as it addresses accounts of harm that compare states.

Shiffrin is concerned that comparative models of harm do not mark out harm as a special category of moral concern. She asks us to consider a case in which *A* is (or could have been) at a higher status,  $x + 2$ , and is lowered to  $x$ , whereas *B* is (or could have been)

---

<sup>47</sup> Shiffrin, *supra* note 40, at 120–23.

<sup>48</sup> *Id.* at 121.

<sup>49</sup> *Id.*

<sup>50</sup> That is why conditions 6 and 6X in his account mention interest graphs.

<sup>51</sup> For discussion of the problems with this aspect of Feinberg's account, see Shiffrin, *supra* note 40, at 120–35, and Perry, *supra* note 42, at 1304–05.

2006]

*Two Models of Tort (and Takings)*

1165

at a lower status,  $x - 2$ , and is elevated to  $x$ . A comparative model of harm is committed to saying that  $A$  has been harmed while  $B$  has been benefited. But, Shiffrin points out,  $A$  and  $B$  are equally well off.<sup>52</sup>

The situation gets even worse if we suppose that  $A$  moves from  $x + 2$  to  $x + 1$ , while  $B$  moves from  $x - 4$  to  $x - 3$ . Here,  $A$  is harmed and  $B$  is benefited even though  $A$  is better off than  $B$ . Given this, Shiffrin wonders: “why should harm, per se, in this sense, be a special subject of moral concern . . . ?”<sup>53</sup> If we restricted our account of harm to the elements set out above, we would have a great deal of difficulty answering Shiffrin’s question. However, in constructing our account of harm, we have only addressed the first of the two questions we set out to answer. We have explored what counts as a setback. But we have yet to explore whether any setback to an interest is a harm or whether only certain setbacks are harms. The answer to Shiffrin’s question lies in this second inquiry.

We have a plethora of interests. We have interests in our health, our financial security, our professional advancement, the enjoyment of our free time, the success of our friends, and so on, ad infinitum. Many of our interests are legitimate, which is to say that nothing is wrong with the pursuit or satisfaction of the interest. Not all of our interests are legitimate, however. If I steal your television set, I have an interest in keeping it. I will be worse off if I lose it. But my interest in your television set is illegitimate. If a court orders me to return your television set, it sets back my interest in retaining it. But it does not seem at all apt to say that the court harms

---

<sup>52</sup> Shiffrin, *supra* note 40, at 122.

<sup>53</sup> *Id.* I have truncated Shiffrin’s question. Her full question is: “[w]hy should harm, per se, in this sense, be a special subject of moral concern and have greater priority than failures to be benefited?” *Id.* Shiffrin suggests, correctly, that we generally regard harms as more significant than failures to benefit. For example, we regard stealing \$500 from  $A$  as morally more significant than failing to give  $B$  \$500, even if both  $A$  and  $B$  are left with the same net worth as a result. Though this is generally true, it is important to note that some failures to benefit are harms—those that infringe a right to the benefit. If an employer fails to pay an employee on the date her salary is due, the failure to confer a benefit is a harm because it sets back the employee’s financial interest (relative to what it would have been had she been paid) and it infringes her right to be paid for her work. See, more generally, the discussion of the connection between rights and harms, *infra* note 54 and accompanying text, and the discussion of the moral significance of harming and benefiting, *infra* notes 69–73 and accompanying text.

me by forcing me to return what is not mine, at least not if we are using “harm” in a morally significant sense.

So our tentative conclusion might be that a harm is a setback to a *legitimate* interest. It turns out, however, that this does not restrict the class of setbacks that count as harms quite enough. Suppose that Lindsay enters a race. She has an interest in winning the race, and her interest is legitimate. Though she has no right to win the race, it would not be wrong for her to do so. Suppose now that Jenna enters the race. Jenna is a faster runner than Lindsay. Her participation severely diminishes Lindsay’s chances of winning. Jenna sets back Lindsay’s interest in winning the race, but Jenna has not harmed Lindsay by entering.

Consider another case. Katherine runs a gas station on the northwest corner of a busy intersection. She has a legitimate interest in the success of her business. Josh decides to open a gas station on the southwest corner of the intersection. The competition sets back Katherine’s interest in the success of her business. She may earn less than she would had Josh not chosen to compete with her. But Josh has not harmed Katherine in any morally significant sense.

These cases (and countless others like them) suggest that not all setbacks to legitimate interests are harms. Indeed, they suggest that a harm occurs only when a setback to an interest infringes a right. Consider the case of Lindsay and Jenna again. The reason that Lindsay is not harmed by Jenna entering the race is that Lindsay does not have a right to be the fastest entrant. All she has a right to is a fair competition. Similarly, all Katherine has a right to is a fair marketplace. She does not have a right to sell gas without competition.

We can now see why Feinberg included his fifth condition in his analysis of harm.<sup>54</sup> For *A* to harm *B*, it is not enough that *A* sets

---

<sup>54</sup> Far from being dispensable, condition 5 is central to a proper understanding of the nature of harm. What about condition 3—that in order to cause harm, an action must be indefensible, that is, not justifiable or excusable? Condition 3 fails because some rights infringements are justifiable yet still cause harm. In this regard, consider *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910). To avoid a storm, a boat remained lashed to a dock past the expiration of its contractual right to do so. The owner of the dock sued to recover for damage the dock sustained due to the presence of the boat during the storm. The court held that the owner of the boat was

2006]                      *Two Models of Tort (and Takings)*                      1167

back one of *B*'s interests. To count as a harm, *A*'s setback of *B*'s interest must infringe one of *B*'s rights. Thus, our account of harm now stands as follows:

*A* harms *B* in the relevant sense if and only if:

1. *A* acts (in a sense wide enough to include omissions and extended sequences of activity).
4. *A*'s action is the cause of an adverse effect on *B*'s self interest (a "state of harm").
5. *A*'s action is also a violation of *B*'s right.
- 6\*. *B*'s personal interest is in a worse condition than it would be in had *A* not acted as he did, *or B*'s personal interest is in a worse condition than it was before *A* acted.

We are now in a position to answer Shiffrin's question. Harm is of special moral concern because a harm is a setback to an interest that infringes a right. Put differently, harms are the results of wrongs.

Suppose that *A* and *B* both have a broken leg. *A* broke her leg riding her bike into a tree. *C* broke *B*'s leg by striking her with a baseball bat. *A* and *B* are in similar states, and their broken legs warrant the same medical attention. Shiffrin is right about that. But *B*'s leg was broken as the result of a wrong, an infringement of her right to bodily integrity. Thus, *B*'s broken leg warrants a response that *A*'s does not—it warrants holding *C* responsible, or liable, for the wrong.

### *B. The Harm-Benefit Asymmetry*

On the model of harms, tort law responds to the harms that we cause others, not the costs we impose on them. The model of harms is not revolutionary. It simply takes the language of tort se-

---

not at fault, that he had acted justifiably. Nevertheless, it required compensation for the damage to the dock.

riously. Set aside the fact that “tort” means wrong.<sup>55</sup> To make out a prima facie case in tort, a plaintiff must prove that 1) the defendant had a duty to the plaintiff, 2) the defendant breached the duty, and 3) the breach of the duty caused the plaintiff damage. Duties are the correlates of rights. Thus, to recover in tort, a plaintiff must show that the defendant invaded a right of hers, causing her damage. That is, the plaintiff has to show that she was harmed by the defendant.

Notice that we do not hold a defendant who has negligently polluted her neighbor’s well liable simply because she has imposed a cost on her neighbor. She could impose costs on her neighbors in all kinds of ways that would not lead to liability. She could paint her house a garish color or put up an unsightly basketball goal.<sup>56</sup> She could even impose costs on her neighbors by treating them unkindly, or by being so successful that she makes them jealous. None of these actions would lead to tort liability, despite the fact that all of them impose costs. They do not lead to tort liability because they do not violate the neighbors’ rights and thus do not cause harm. In contrast, polluting a neighbor’s well causes harm because it invades the neighbor’s property right. Tort provides a remedy for the harm, not for the cost.

One could make a similar point about restitution. We do not hold defendants in restitution actions liable simply because they have received a benefit from the plaintiff. The plaintiff must identify a right to restitution, and correspondingly, a duty on the defendant’s part to make payment for the benefit received. In this way, tort and restitution are symmetrical. In neither regime can a plaintiff recover simply by demonstrating that there has been an inefficient allocation of the externalities of some party’s behavior. Tort and restitution respond to the violation of rights and the failure to discharge duties, not to inefficient allocations of the costs and benefits of people’s actions.

If you are persuaded of this, then I have accomplished most of what I aimed to do in this Essay. I have persuaded you that harm is the organizing concept in tort law, not cost. Yet, this might seem a

---

<sup>55</sup> 18 Oxford English Dictionary 275 (2d ed. 1989).

<sup>56</sup> Some communities attempt to regulate “aesthetic nuisances,” and in those communities these actions might cause harm by infringing the rights of neighbors.

2006]

*Two Models of Tort (and Takings)*

1169

pyrrhic victory, or not yet a victory at all, for two related reasons. The first is that while I have criticized the model of costs for failing to account for law's harm-benefit asymmetry, I have not shown that the model of harms explains it. Indeed, I have asserted that the model of harms is reflected in a structural symmetry between tort and restitution, in that both institutions accord indispensable roles to rights and duties. I have not yet explained the puzzle we started with—why the victims of harm are able to recover compensation more frequently than the recipients of benefits are required to make repayment.

The second reason my argument thus far may be unsatisfying is that I have left a clear avenue of response open to a partisan of the model of costs. An economist might say, "I grant that rights, duties, and harm are all essential to the normative structure of tort law. After all, the practice does not allow one to argue directly about costs and incentive effects. Nevertheless, the model of costs provides a powerful tool for explaining the rights and duties people have in the law. Indeed, it provides the best account of those rights and duties." I will address this view first, as responding to it will give us insight into how the model of harms explains the harm-benefit asymmetry.

Our imagined interlocutor's intervention is ambiguous. She might be suggesting that the model of costs explains the rights and duties people have in tort and restitution as a descriptive matter. That is, she might be suggesting that, in tort and restitution, people actually have the rights and duties the model of costs would assign to them. These are the rights and duties that would, roughly speaking, maximize social welfare. If this is the interlocutor's point, she has not made the model of costs any more attractive that it was when we started.

We have already seen that, in a variety of respects, the duties to make repayment in restitution are less robust than we would expect if the institution were aiming at an efficient allocation of positive externalities. The focus of the model of costs on the inefficiency of externalities suggests that rights and duties accorded people in respect of positive externalities ought to be more or less symmetrical to their rights and duties in respect of negative externalities. But that is not what we observe in the law. To account for the asymmetry, a partisan of the model of costs must appeal to

costs and incentive effects. We have every reason to believe that this endeavor will devolve into the same confusing mishmash of ad hoc explanations of particular cases that we encountered before. Moreover, there is every reason to believe that to the extent the model of costs can explain the duties tort and restitution assign, it will do so in language that differs starkly from the language of the law, in language that differs starkly from the things that judges say in deciding cases.

The suggestion that the model of costs can explain the rights and duties people have in the law has deeper problems. As Professor Coleman has observed, “the category of duty does no work in the law and economics accounts of tort law.”<sup>57</sup> In tort law, courts impose liability (in the form of a duty to compensate) on the ground that a defendant has failed to discharge a first-order duty of care (or a duty not to harm). Coleman explains the problem with the model of costs as follows:

In the economic analysis, the fundamental question is how to allocate costs between defendant and plaintiff. Rather than being logically prior to the liability as the ground of it, the duty not to harm is construed in the economic analysis as a *consequence* of the liability. Thus, the “primary” duty simply falls out of the economic grounds for imposing a duty to compensate, and is not a duty that is independently defensible as a standard of conduct apart from the role it plays in warranting or explaining a liability judgment.<sup>58</sup>

Coleman concludes that “while in principle we could have an efficiency theory of duties, what economists offer is not an efficiency theory of duties at all, but an efficiency theory of liability or of cost allocation.”<sup>59</sup> Thus, our interlocutor’s suggestion, that the model of costs best explains the duties that tort and restitution assign, fails because the economic explanation gets the structure of these institutions precisely backwards. Economists treat tort law’s primary duties as conclusions that follow from judgments about who should

---

<sup>57</sup> Jules L. Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 35 n.19 (2001).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 35–36.



2006]

*Two Models of Tort (and Takings)*

1171

bear costs, but the institution treats the failure to discharge primary duties as grounds for deciding who bears costs.<sup>60</sup>

Perhaps, then, we should understand the interlocutor's point as a normative one. That is, we should understand the interlocutor as saying, "I am not all that interested in explaining the rights and duties people actually have in the law. I am interested in the rights and duties people ought to have in the law. I believe people should have the rights and duties the model of costs would assign to them, which are the rights and duties that would maximize social welfare." This is a totally different type of intervention. Conceived this way, our interlocutor is not aiming at explaining tort law, but rather at providing standards for evaluating it, and perhaps suggestions for reforming it.<sup>61</sup> To succeed in establishing that tort and restitution ought to assign people the rights and duties the model of costs would suggest, the interlocutor would have to persuade us that the law ought to maximize social welfare. That is, the inter-

---

<sup>60</sup> For further discussion of this point, see Professor John Gardner's critique of Coleman's argument in John Gardner, *Backward and Forward with Tort Law*, in *Law and Social Justice* 255, 262–80 (Joseph Keim Campbell et al. eds., 2005), and Coleman's response, Jules L. Coleman, *Facts, Fictions, and the Grounds of Law*, in *Law and Social Justice*, supra, at 327, 327–36. Gardner argues that economists can account for the fact that, within tort, failure to discharge a primary duty is the ground for imposing liability. They can do so by defending a principle of corrective justice linking primary duties to secondary duties of repair on efficiency grounds. Coleman agrees that economists might defend a principle of corrective justice in this way. However, he points out that an economic defense of such a principle will depend on existing transaction costs. Because of this, Coleman argues, one can use counterfactuals to test the success of the model of costs as an explanation of tort law. If transaction costs were eliminated or drastically reduced, economic considerations would suggest radically different practices from the ones we have. For example, economic considerations would suggest that victims should search out and sue least-cost avoiders rather than the people who injured them. And, in a world with reduced transaction costs, legal inquiries would focus on who could reduce risk optimally, rather than on whether a victim was harmed by an injurer's failure to discharge a duty. Coleman argues that if we would not think these changes appropriate in the face of reduced transaction costs, the fact that it might be possible to defend a principle of corrective justice on efficiency grounds given existing transaction costs "has no bearing on the explanation of the practice we have." *Id.* at 336.

<sup>61</sup> Thus, the interlocutor will not tarry over Coleman's concern that, in the economic account, duties of care are consequences of judgments about who shall bear liability, rather than grounds for the imposition of liability. Freed from any need to offer a convincing explanation of the structure of tort law, this interlocutor is free to turn the institution on its head.

locutor would have to justify broadly utilitarian criteria for evaluating the success of our legal institutions.

It is not possible to give a full response to this suggestion here. Instead, I will put my cards on the table and acknowledge that I am deeply skeptical of the idea that we should judge our legal institutions solely by the extent to which they maximize social welfare. One reason I am skeptical is that I think persons are the primary objects of moral concern, not populations.<sup>62</sup> A community that has maximized its social welfare may nevertheless have within it many persons living deplorable lives. I do not think the maximization of social welfare provides adequate justification for such social arrangements. Indeed, I think we have an obligation to create a society in which a good life is a possibility for everyone, even if that means society as a whole will be less well off than it might be otherwise.<sup>63</sup> Of course, all this is rather brusque. The question of whether we should evaluate our legal institutions by the extent to which they maximize social welfare is, in large part, a question of whether utilitarianism provides an adequate moral theory. Obviously, that is not a question to be answered here.

We should note, however, that if we take the interlocutor to be making a normative point, we have strayed far from our initial inquiry. When we set out, our goal was to decide whether the model of costs or the model of harms provided the better account of tort law. Now we are treating the model of costs as providing a vision of what tort law *ought* to be, assuming we accept certain normative premises. So understood, the model of costs is no longer a rival to the model of harms as an explanation of tort law.

Despite this, it is worth noting how different our institutions might look if we accepted the model of costs as a normative model. We have seen that, in a variety of respects, the law does not assign us the rights and duties that the model of costs would suggest. If we ought to be maximizing social welfare, then we ought to reform our law so that restitution requires the repayment of benefits received whenever it is efficient to do so. Thus, barring some explanation of

---

<sup>62</sup> Persons are the primary objects of moral concern, but not the only objects. Animals, ecosystems, works of art, and many other things in the world are proper objects of moral concern.

<sup>63</sup> Which is different from saying that we have an obligation to guarantee everyone a good life.

why it is inefficient to require the operators of the rooftop bleacher to compensate the Chicago Cubs, we ought to allow the Cubs to recapture the benefits they have conferred on the owners. Doing so will ensure that the Cubs do not forego investments in their team that are cost justified.

That might not seem radical. However, the model of costs might end up recommending quite radical changes. Coleman has argued that the model of costs has difficulty explaining why injurers have duties to compensate victims in tort. Indeed, the model of costs has difficulty explaining every aspect of this fact. It has difficulty explaining why the duty to compensate falls to injurers, rather than least-cost avoiders.<sup>64</sup> It has difficulty explaining why the victim of a tort receives compensation from anyone at all.<sup>65</sup> And it has difficulty explaining why the victim of a tort receives compensation from the injurer, rather than, say, from a state fund supported through risk-based taxes on activities.<sup>66</sup> If we were to take the model of costs seriously as a normative model, it is quite possible that we would end up with an institution that dispensed with these elemental features of tort. We might end up with an institution in which a victim has a duty to seek out and sue the person who could have avoided an injury at the least cost, even if that person did not injure her. Or we might end up with a system that decoupled compensation for victims from the imposition of liability on injurers, eliminating lawsuits from the practice altogether.

---

<sup>64</sup> See Coleman, *supra* note 57, at 18. As Coleman has noted, in the economist's account, the victim sues the injurer not because the injurer owes her a duty of repair for having harmed her, but because "the costs of searching for those in the best position to reduce the cost of future accidents is too high." *Id.* We can add this to our growing stock of odd explanations of central features of tort law generated by the model of costs.

<sup>65</sup> See *id.* at 18–19.

<sup>66</sup> See *id.* at 18 ("[H]ow does the economist explain the fact that if the victim makes out his case against the injurer, he is entitled to compensation for damages *from the injurer*? Again, the economist cannot call upon the fact that the injurer incurs a duty to repair the victim's loss because he has wrongfully harmed him. It is one thing to ask whether there are good economic reasons for holding the injurer liable to certain costs. It is another question whether similar economic considerations require that *the victim* be compensated for his loss. It is yet another question—assuming that the injurer should be liable and the victim compensated—whether the victim should be compensated *by the injurer*.").

None of this should be surprising. In *The Cost of Accidents*, Calabresi recognized that adopting the model of costs might well push one to abandon the tort system in favor of institutional arrangements that would allocate the costs of accidents more efficiently.<sup>67</sup> He also recognized that those institutions might bear little resemblance to tort law.<sup>68</sup> This recognition has always sat uncomfortably with the suggestion that the model of costs provides the best explanation of tort law as things currently stand.

Though I do not think it is promising, I do not mean to suggest that our interlocutor's normative suggestion is a dead end. It is worth further consideration, but we should return to our main inquiry: determining whether the model of costs or the model of harms provides a better explanation of tort law. In Part I, we learned that, in addition to the problems with the model of costs that Coleman and others theorists have already pointed out, a further problem exists. The model of costs does not provide a satisfying explanation of law's harm-benefit asymmetry. So now we face the question: can the model of harms explain law's harm-benefit asymmetry?

The answer is "yes," but we must proceed carefully. When we initially framed the question about law's harm-benefit asymmetry, we did so in terms of costs, not harms. We asked, "why does law require people to internalize their negative externalities far more often than it allows people to recapture their positive externalities?" To determine whether the model of harms can explain the harm-benefit asymmetry, we need to restate the problem in terms of the concepts central to the model of harms. As a first stab, we might ask, "why does the law provide a remedy for harms more often than it provides a remedy for \_\_\_\_?" But what do we put in the blank?

It is not clear what belongs in the blank because, unlike negative and positive externalities, harms and benefits are not mirror images of one another. Harms are a restricted class of costs (or setbacks to interests); they are costs that result from wrongs, or rights infringements. The problem with filling in the blank in the question above is that we do not have a term in our moral discourse for the

---

<sup>67</sup> Calabresi, *supra* note 1, at 312–17.

<sup>68</sup> *Id.* at 287.

2006]

*Two Models of Tort (and Takings)*

1175

mirror image of harms. The closest thing we have is a legal term—unjust enrichment—which itself invokes a notion closely related to harm, a notion that it is sometimes wrong to retain a benefit received. The law of unjust enrichment is, of course, a core part of the law of restitution.

With this in mind, let us take another stab at reframing the puzzle of law's harm-benefit asymmetry. On the model of costs, tort and restitution respond to different types of externalities. Tort responds to negative externalities; restitution responds to positive externalities. On the model of harms, tort and restitution respond to different types of wrongs. Tort responds to wrongful losses (which I have called "harms"); restitution responds to wrongful gains. Put differently, tort responds to costs that are imposed in ways that infringe rights; restitution responds to benefits that are received or retained in ways that infringe rights. Thus, to the extent that law's harm-benefit asymmetry is a puzzle on the model of harms, the puzzle is this: why does the number of wrongful losses remedied by tort far exceed the number of wrongful gains remedied by restitution?

The answer is that there is an underlying moral asymmetry between losses and gains. We regard imposing costs on others as wrongful more frequently than we regard receiving a gain from others as wrongful. Law's harm-benefit asymmetry is a reflection of this underlying moral asymmetry.

Some examples will help to illustrate the moral asymmetry. If someone discharges an air horn in a public place for the purpose of disturbing the people passing by, we are apt to think that she has done something wrong. But if a busker plays beautiful music for the purpose of entertaining the people passing by, we are unlikely to think that those who hear the music do something wrong in enjoying it. We might think it nice if they offered a tip; however, in all but the rarest circumstances, we do not think they have an obligation to do so. Tipping buskers is supererogatory.

To take a different example, when someone cuts in a long line without regard to the people behind her, we think she has done something wrong, especially if someone in line is denied a ticket as a result. But when someone leaves a line and a person who would have been denied a ticket receives one, we do not think that the person who gets the ticket does anything wrong in enjoying it. In

the rare instance that the first person left the line in order to give the ticket to someone else (perhaps an adult gives up her place to ensure that a child is admitted), gratitude is likely in order. Yet, we would not think kindly of the person who, after leaving the line, demanded compensation from the person who benefited. Likewise, if a developer, considering only his own self-interest, builds a shopping mall that has deleterious environmental effects, we are likely to consider him blameworthy. But if he builds a shopping mall that has salutary effects on the local job market, we do not think those who benefit do so wrongly, or that they owe the developer compensation for the benefit received.<sup>69</sup> To these examples, we could add many others.<sup>70</sup>

These examples are, of course, similar to the legal examples which led off this Essay. And that is the point—law's harm-benefit asymmetry is a reflection of morality's harm-benefit asymmetry. Indeed, from the perspective of the model of harms, law's harm-benefit asymmetry is not really a puzzle at all. It is what one would expect to find on the supposition that our legal duties aim to track, more or less precisely, our moral duties.

In my view, tort and restitution institutionalize practices of accountability in respect of many of the important moral duties that we owe one another.<sup>71</sup> To revisit some examples from earlier in the Essay, I think the best explanation of the duty not to defame has little to do with costs and incentive effects, and much to do with the belief that people have a right not to have their reputations sullied unfairly. I think the best explanation of the fact that we do not allow jealous neighbors to sue a successful businesswoman for the discomfort and jealousy she causes them is not because we think it would be inefficient, but rather because we think she does them no wrong (even though she imposes a cost) by succeeding. I think that we require creditors to repay debtors who have mistakenly overpaid their debt out of a sense of what is fair, not because we think,

---

<sup>69</sup> Professor Mark Greenberg suggested this example.

<sup>70</sup> For a fascinating discussion of the asymmetry between the rules of praise and the rules of blame, see Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* 197–203 (1996).

<sup>71</sup> Of course, I do not think that all our moral duties are reflected in legal duties, nor do I think that all our legal duties are based on underlying moral duties. Rather, I think that the core of tort law is best understood as an institution which provides for interpersonal accountability in respect of some of our more important moral duties.

2006]

*Two Models of Tort (and Takings)*

1177

all things considered, it is efficient to do so. I think that if we were to deny the Cubs restitution, it would be because we think that people do nothing blameworthy in inviting others onto their property to enjoy the view. In each case, the presence or absence of a wrong explains the legal rule.

Of course, I cannot even hope to capture our moral sensibilities across these cases in a single principle, as an economist might. To justify them, I would have to reason case by case, examining each situation in light of the relevant values, one of which *is* welfare.<sup>72</sup> If that approach sounds familiar, it is because it is the approach of the common law. No doubt this approach is messier than the economic approach, especially for those who think that human values are not always commensurable with one another. Instead of measuring and maximizing, we have to feel our way through a variety of considerations, and sometimes make tragic choices when we find that the values we must pay heed to conflict with one another.<sup>73</sup>

The advantage of the model of harms is that it offers a wealth of resources beyond costs and incentive effects for making sense of our moral lives and legal duties. The model of harms can appeal to the full range of human values: justice, fairness, dignity, autonomy, liberty, and so on. So, even though we will have to explain our moral duties (and, derivatively, our legal duties) case by case, the model of harms offers much better prospects for finding satisfying explanations than the model of costs.<sup>74</sup> We also have the prospect of explaining the common law in a way that takes seriously the language of the law and the things judges have said over the years in

---

<sup>72</sup> See Coleman, *supra* note 57, at 34–35 (“[M]uch of the content of the first-order duties in tort law is created and formed piecemeal in the course of our manifold social and economic interactions. . . . If I am right about this, then it seems unlikely that we could ever have a general theory from which we might derive the first-order duties protected by tort law.”).

<sup>73</sup> Of course, utilitarianism does not make moral choices easy either, since in all but the simplest cases we have no idea how to value the relevant variables in the calculus.

<sup>74</sup> Unlike the model of costs, the model of harms does not need to resort to ad hoc explanations of particular cases to explain law’s harm-benefit asymmetry. The model of harms’ explanation of law’s harm-benefit asymmetry is straightforward: law’s harm-benefit asymmetry is a reflection of an underlying moral asymmetry. As I have said, to explain the moral asymmetry, one will have to reason case by case. But that is not a defect in the model of harms. The model of harms merely tells us that the law responds to wrongs, not costs. To account for what we regard as wrong, we do not need a theory of tort law; we need a theory of morality.

deciding cases. The model of harms does not have to treat the history of the common law as a bizarre game in which judges speak of a whole range of values, yet (consciously or not) decide cases only with an aim to maximize social welfare. These are the reasons why, ultimately, the model of harms provides a more satisfying account of tort law than the model of costs.

### III. THE TAKINGS-GIVINGS ASYMMETRY

The harm-benefit asymmetry in private law has a public law analogue in the Takings Clause. The Fifth Amendment prohibits the taking of private property “for public use, without just compensation.”<sup>75</sup> On the model of costs, this requirement is aimed at promoting efficient government behavior. The costs incurred by an owner whose property is taken is a negative externality of the government’s exercise of eminent domain power. Requiring the government to pay just compensation forces internalization of the externality. Of course, positive externalities are also inefficient. So if the Takings Clause is an efficiency-oriented rule, one would expect to find a complementary rule requiring the government to recapture its positive externalities. Such a rule could take the form of a Givings Clause, which would require that the government impose a fair charge whenever it confers property on private individuals.

This argument has recently been developed by Professors Bell and Parchomovsky. They state it succinctly: “[t]akings, when uncompensated, generate negative externalities; givings, when unaccounted for, generate positive externalities. From an economic standpoint, neither type of externality should remain outside the state’s calculus.”<sup>76</sup> Of course, the Constitution does not include a Givings Clause, so the model of costs faces the same puzzle in explaining takings that it does in explaining torts.

Courts currently recognize two types of takings—physical and regulatory. Bell and Parchomovsky argue that courts ought to recognize a third type of taking—derivative takings. They explain the taxonomy as follows:

---

<sup>75</sup> U.S. Const. amend. V.

<sup>76</sup> Bell & Parchomovsky, *supra* note 5, at 554.



2006]

*Two Models of Tort (and Takings)*

1179

A physical taking occurs when the state seizes a property interest in order to put it to public use. In a regulatory taking, the state does not seize the property interest, but it regulates its use in a manner that unduly diminishes property values. A derivative taking is present whenever a taking diminishes the value of surrounding property.<sup>77</sup>

Suppose that the state takes my property and builds a highway on it. If the presence of the highway diminishes the value of your land, then, in Bell and Parchomovsky's parlance, you have suffered a derivative taking. I want to explore the argument in favor of recognizing derivative takings before we turn to the argument in favor of givings, because the former will illuminate the latter.

Bell and Parchomovsky make their case for requiring compensation for derivative takings by considering the case of *United States v. Causby*.<sup>78</sup> In *Causby*, the military began flying aircraft at low altitude above the plaintiffs' homes, and the plaintiffs argued that this constituted a taking of their property. The Supreme Court held that the air-route created an easement on the plaintiffs' air-rights, and it held that they were entitled to just compensation. The Court said that a "landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."<sup>79</sup> Since *Causby* grounds the finding of a taking in the physical invasion of the air space above the plaintiffs' property, it implies that neighboring landowners, who presumably suffered from the noise of the planes just as much as the plaintiffs, were not the victims of a taking and thus were not entitled to just compensation.<sup>80</sup>

Bell and Parchomovsky argue that the result in *Causby* is unfair and inefficient:

The outcome is unfair because, from the point of view of the equally harmed property owners, the location of the lots relative

---

<sup>77</sup> Abraham Bell & Gideon Parchomovsky, Takings Reassessed, 87 Va. L. Rev. 277, 280 (2001).

<sup>78</sup> 328 U.S. 256 (1946).

<sup>79</sup> Id. at 264.

<sup>80</sup> Bell and Parchomovsky describe *Causby* as having held that landowners whose land did not lie directly below the route were not entitled to just compensation. Bell & Parchomovsky, supra note 76, at 279. Though I think that is the clear implication of the opinion's emphasis on the physical invasion of the landowner's airspace, I do not read the Court as having reached the question.

to the flight routes is irrelevant and arbitrary. Harm to the property directly over-flown—the physical taking—is fully compensated, while the same harm to the neighboring lot which lies one inch from the line of the air route—the derivative taking—remains fully uncompensated. The outcome is inefficient because it permits government to externalize on private property owners a substantial part of the cost of a decision or policy that is acknowledged to be a taking, leading to inaccurate assessments of the cost effectiveness and desirability of government policies.<sup>81</sup>

Bell and Parchomovsky are right; the rule in *Causby* is unfair and inefficient. It is not irrational, however, and we can learn something about takings by considering why the Court reached the result it did. As Bell and Parchomovsky tell the story, the owners whose land lay just off the route were *harmed* to the same extent as the owners whose land lay directly under the route. But we know that is inaccurate, at least as far as the owners' property rights are concerned. The placement of the air routes infringed the property rights of the owners whose land lay directly below because their property rights included a right to exclude others from the air immediately over their property. Other landowners may have incurred the same cost as those directly below the route, but they were not harmed vis-à-vis their property rights since the aircraft did not pass over their land.

The Court's decision in *Causby* can be understood as providing a remedy to the plaintiffs on the ground that they had been harmed, not on the ground that they had incurred a cost. When framed that way, I think the result is both principled and unsurprising. That said, I do not approve of the result in *Causby*. I am inclined to agree with Richard Epstein's observation that the Court made a mistake in construing the "entrance into protected airspace, [and] not the disturbance it generated, [as] the gist of the government wrong."<sup>82</sup> That is, the neighboring property owners were harmed if they had a right to the quiet enjoyment of their property that was infringed by the airplanes flying overhead. Had the Court con-

---

<sup>81</sup> Id. at 279–80.

<sup>82</sup> Id. at 279 n.10 (citing Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 50 (1985)).

2006]

*Two Models of Tort (and Takings)*

1181

strued the right involved differently, it might have reached a result that would have allowed recovery by the neighboring landowners.

Nevertheless, *Causby* is instructive. It indicates that the gravamen of a takings claim is that the government has inflicted harm on the plaintiff, not that the government has imposed a cost. One will regard different things as takings depending on whether one thinks the gravamen of a taking is the infliction of harm or the imposition of a cost. A physical seizure of property always imposes a cost (though sometimes the cost is de minimis, and sometimes it is offset<sup>83</sup>), and it always infringes a property right. Thus, physical seizures are takings on both the model of costs and the model of harms.

Regulatory takings are more complex. Changes in regulations that diminish the value of property impose costs by definition. Thus, on the model of costs, they should be paradigmatic instances of takings. In fact, they are anything but. One cannot recover, as the model of costs would predict one could, simply on the basis that a regulatory change imposes a cost.

In the view of most commentators, regulatory takings jurisprudence is a mess. However, we can make sense out of the doctrine by considering it from the perspective of the model of harms. On the model of harms, a change in regulation constitutes a taking if the change infringes an owner's property right. Determining whether a regulatory change infringes a property right is difficult because owners have never had complete dominion over their land. Owners have always held land subject to use restrictions, including the limitation that the use of one's own property cannot unreasonably and substantially interfere with the use and enjoyment of another's property. In the modern world, zoning and other types of regulation have greatly limited the bundle of rights that attach to property ownership. We have the intuition that some changes in regulation infringe an owner's preexisting property rights, but against a background of pervasive and shifting regulation, it is difficult to identify which changes those are.

---

<sup>83</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 437–38 n.15 (1982) (holding that an easement for cable wiring constituted a taking, notwithstanding the fact that it may have increased the value of the property).

When the problem is understood this way, the doctrine is not all that surprising. A regulation that destroys the value of a property completely is a taking, unless the regulation is intended to prevent a nuisance.<sup>84</sup> This per se rule makes sense. A regulation that renders a property valueless to an owner wreaks havoc similar to stripping the owner of title.<sup>85</sup> One ought to be indifferent between owning something of no value and owning nothing at all. The exception for nuisance prevention is also warranted, because it reflects a limitation which has long been built into property ownership.

Once the per se rules have been exhausted, courts apply the three factor test of *Penn Central Transportation Co. v. New York City*<sup>86</sup> to determine whether there has been a regulatory taking. They consider the owner's reasonable investment-backed expectations, the nature of the government action, and the degree of diminution in property value. These questions are confusing if one thinks that the gravamen of a taking is the imposition of a cost. Why not just ask whether the action has imposed a cost? All three questions, however, are decent proxies for the question courts are really grappling with: whether the regulatory change infringes a preexisting right of the property owner. A regulatory change may diminish the value of the property without infringing a right if the newly limited use was previously permitted but not protected by a right.

Suppose that current regulations allow Jane to build a three-story building on her property and that a proposed change would limit her to building only two stories. We want to know whether Jane's property right is infringed by the limitation, and, conse-

---

<sup>84</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.").

<sup>85</sup> See *id.* at 1017 ("Perhaps [the justification for this rule] is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." (citing *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting))).

<sup>86</sup> 438 U.S. 104, 124 (1978).

2006]

*Two Models of Tort (and Takings)*

1183

quently, whether compensation will be required. It is hard to say, however, because it is not clear just what rights attach to property ownership in our heavily regulated world. It seems plausible to us that the limitation invades Jane's right to use her property as she wishes, but also plausible that her right to do so has always been limited by the regulatory regime, that while she has been permitted to build three stories, she has never possessed a right to do so.

The Supreme Court's decision in *Lucas v. South Carolina Coastal Council* supports this approach to understanding takings.<sup>87</sup> In *Lucas*, the plaintiff alleged that South Carolina's Beachfront Management Act had deprived his property of all economic value. The Act would have barred the plaintiff from building any permanent habitable structures on his lots. The Court held that, in determining whether the regulation at issue worked a taking, the proper inquiry was into whether the limitation imposed by the regulation was built into the landowner's title:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."<sup>88</sup>

On remand, the Court directed the South Carolina courts to determine whether "background principles of nuisance and property law" prohibited the uses to which the landowner intended to put his property, but for the regulation.<sup>89</sup>

---

<sup>87</sup> 505 U.S. 1003 (1992).

<sup>88</sup> *Id.* at 1027 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

<sup>89</sup> *Lucas*, 505 U.S. at 1031–32.

*Penn Central's* three-factor test helps in elucidating the limitations built into a landowner's title. By asking whether the regulation interferes with the investment-backed expectations of the parties, we get a sense of how the parties involved understood the normative situation. We get a sense of whether Jane believed she had a right or merely permission which might be revoked or altered. By looking to the diminution in the value of the property, we can measure the significance of the use limitation. We might operate with the assumption that the more significant the limitation, the more likely it is to infringe rights which were believed to attach to ownership of the land.<sup>90</sup> Finally, the character of the government action matters because certain actions, such as the physical invasion of property, more clearly infringe the rights of owners than others.<sup>91</sup> The three-factor test is far from perfect, but it is sensible given the difficult problem it addresses.

Now we can return to what Bell and Parchomovsky call derivative takings. The taking of a neighboring piece of property may impose costs, but it never interferes with an owner's property rights. Owners have no rights that could be affected by who owns adjacent property. When the government takes property near my land to build a prison, it diminishes the value of my property. But it does not infringe any property right of mine, because (at least traditionally) I have no rights regarding how others use their property, save for the limited protection nuisance law provides.

Bell and Parchomovsky read Justice Holmes in *Pennsylvania Coal Co. v. Mahon*<sup>92</sup> to say that government action can constitute a taking when it significantly diminishes the value of a property. According to them, "[t]he focus on government action that reduces property value naturally suggests a third type of taking."<sup>93</sup> This is

---

<sup>90</sup> See *id.* at 1028 ("In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.").

<sup>91</sup> *Penn Central*, 438 U.S. at 124 ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., *United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.").

<sup>92</sup> 260 U.S. 393 (1922).

<sup>93</sup> Bell & Parchomovsky, *supra* note 5, at 559.

2006]

*Two Models of Tort (and Takings)*

1185

the so-called derivative taking, which diminishes the value of a property by an action which does not affect ownership or its attendant rights in any way. Whether Bell and Parchomovsky have Holmes right or not,<sup>94</sup> it cannot be the case that significant diminution in the value of property is all that is necessary to constitute a regulatory taking.<sup>95</sup> If diminishing the value of property a great deal is a taking, why is diminishing the value a little not also a taking, albeit one that demands less compensation? The better view is that significant diminution in the value of property is evidence that there has been a taking, evidence that a right of property ownership has been infringed. The evidence is most clear when the value of the property has been wiped out entirely, but other significant diminutions can indicate that the regulation has changed the bundle of rights people understood to be attached to ownership of the property.

If significant diminution in the value of property was a constitutive element of a regulatory taking, regulatory takings would be in consonant with physical takings. In the realm of physical takings, the slightest encroachment constitutes a taking. In *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>96</sup> the Supreme Court held that an easement for cable television wiring constituted a taking. This result cannot be explained by an approach that takes the diminution of property value to be the rationale for the compensation, as the cable wiring did not decrease the value of the property. Indeed, it may have enhanced it.<sup>97</sup> *Loretto*'s result is exactly what one would

---

<sup>94</sup> Passages in Holmes's opinion can be read to suggest that significant diminution in value is enough to constitute a taking. See, e.g., *Mahon*, 260 U.S. at 413 ("One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."). However, the opinion also emphasizes the fact that there is a right involved. Holmes notes that "[f]or practical purposes, the right to coal consists in the right to mine it." *Id.* at 414 (quoting *Commonwealth ex rel. Keator v. Clearview Coal Co.*, 100 A. 820, 820 (Pa. 1917)). So it is not clear that Holmes would find a taking on the basis that the value of property was diminished if no right was infringed.

<sup>95</sup> Except in the extreme instance when the value of property is driven to zero. As noted above, destroying the value of property entirely is a per se regulatory taking. But that rule can be understood as a recognition of the fact that destroying the value of property entirely is functionally equivalent to stripping the owner of title.

<sup>96</sup> 458 U.S. 419, 421 (1982).

<sup>97</sup> *Loretto*, 458 U.S. at 452 (Blackmun, J., dissenting).

expect, however, if the gravamen of a takings claim is the infringement of a property right.

On the model of costs, it is a puzzle that courts have yet to recognize derivative takings; on the model of harms, however, they simply are not takings. In this respect, the model of harms better explains takings jurisprudence as it currently stands.

The insight that takings jurisprudence is a mechanism for redressing harm, rather than a mechanism for promoting economic efficiency, illuminates the difference between takings and givings. Takings infringe the property rights of owners. Givings, while they may be unfair, inefficient, or otherwise unwise, do not, by their nature, infringe anyone's rights.<sup>98</sup> To be sure, the Takings Clause contributes to government efficiency by requiring the government to internalize some of the negative externalities of its action. A Givings Clause would assist in this end by allowing recapture of positive externalities. That may be reason enough to adopt one (or a statutory givings scheme). But efficiency is a poor explanation of the takings jurisprudence we actually have because it leaves it completely mysterious why we do not have a jurisprudence of givings. In fact, it is not mysterious at all.

#### CONCLUSION

On the model of costs, law's harm-benefit asymmetry is puzzling. Positive externalities are as inefficient as negative externalities, so if we accept the model of costs as an explanation of tort (or takings) we are left to wonder why we do not have more robust institutions to address positive externalities.<sup>99</sup> Unlike the model of

---

<sup>98</sup> The manner of a giving might interfere with someone's rights. Givings that are made on a racially discriminatory basis, for example, might infringe equal protection rights. But it is not inherent in the nature of givings that they infringe rights.

<sup>99</sup> Several people, including Professor Larry Solum and Aditya Bamzai, have responded to earlier versions of this Essay by suggesting that property law addresses the capture of positive externalities. This suggestion draws on Professor Harold Demsetz's seminal article, *Toward A Theory of Property Rights*, 57 *Am. Econ. Rev. (Papers & Proc.)* 347, 348 (1967), which argues that "[a] primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities." Demsetz is certainly right that this is one function of property rights. The creation of property rights allows an owner to capture what would otherwise be positive externalities of her actions. For example, property rights allow an owner to capture the value of the improvements she makes to her land by excluding others from it. In the absence of a right to exclude others, the improvements may redound to their



2006]

*Two Models of Tort (and Takings)*

1187

costs, the model of harms does not generate this puzzle because we attach different moral significance to harms and benefits. From the perspective of the model of harms, it is perfectly intelligible that the institution that redresses the harms that we inflict on one another is more robust than the institution that allows recapture of the benefits that we confer on one another. Indeed, law's harm-benefit asymmetry is exactly what we would expect, given the asymmetry between harms and benefits in our moral lives.

That the model of harms provides a better explanation of tort law than the model of costs does not mean that economic approaches to thinking about tort have no value. We ought to care whether tort law is efficient, and the strength of economic analysis is that it helps us see clearly an institution's costs and incentive effects. Such an analysis, however, is not the only one worth undertaking. Simply explaining legal institutions—accounting for why we have them and what they contribute to our lives—is a worthwhile project. It is worthwhile in part because it has the potential to teach us something about ourselves. In this Essay, I have shown that the legal asymmetry between harms and benefits reflects an asymmetry in our moral views.

Explaining legal institutions is also worthwhile because it sharpens the choices we face in deciding whether to retain or reform them. Unlike criminal law or contract law, we can actually imagine eliminating tort law altogether. New Zealand has adopted a no-fault system to allocate the costs of accidents, and, from time to

---

benefit, rather than to hers. Thus, the existence and scope of property rights can be construed as a way in which the law addresses the capture of external benefits.

This does not, however, answer the challenge to the model of costs posed in this Essay, as the very same point can be made about external costs. Property rights require an owner to internalize what would otherwise be negative externalities of her actions. An owner who makes a mess on her own land bears the associated costs. Indeed, Demsetz argues that "property rights arise when it becomes economic for those affected by externalities to internalize *benefits and costs*." *Id.* at 354 (emphasis added).

From a Demsetzian perspective, property rights will be used to promote internalization until the costs from internalization outweigh the gains. Assuming that an optimal property regime does not achieve full internalization, we can ask whether we ought to internalize the remaining externalities (positive or negative) through some other legal regime. In the case of negative externalities, tort law frequently steps into the breach and requires internalization. But the law does not provide for the internalization of positive externalities to nearly the same extent. This asymmetry is a puzzle for the model of costs.

time, tort scholars suggest that we do the same. I do not know whether this is wise, but I do know this: if all you see when you look at tort are costs and incentive effects, you fail to appreciate the nature of the choice we face. We are not simply choosing which institutional arrangement will minimize the costs of accidents. We are deciding what we want our institutions to do for us. Do we want an institution that minimizes costs, or do we want an institution that allows us to hold one another accountable for the harms that we cause? A pure no-fault system might do a splendid job of the former by sacrificing the latter. Understanding that tort is a mechanism for holding people accountable for their wrongs clarifies the choice we face as we decide whether to reform tort or abandon it.